

57738-7

57738-7

NO. 57738-7-I

80441-9

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant.

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY CANOVA, JUDGE

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**BRIEF OF RESPONDENT**

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NORM MALENG  
King County Prosecuting Attorney

LEE D. YATES  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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A. ISSUES PRESENTED

1. When the State presents evidence of multiple acts that indicate a continuing course of conduct, a unanimity instruction is not required. Here, the evidence showed that the defendant's assault in the second degree and felony harassment crimes were committed in a very short time against the same victim in a continuous manner. Under the circumstances, was a unanimity instruction required?

2. Under RAP 2.5(a) a party may not raise a claim of error on appeal that was not raised in the trial court unless it involves a manifest error affecting a constitutional right. Here, the defendant did not propose any self-defense instructions, and took no exceptions to the court's WPIC self-defense instructions or to the failure to give other WPIC instructions. When the defendant has not shown that any alleged errors in the instructions had any identifiable or practical effect on the trial, has he waived any claim of error on appeal?

3. A trial court determination that multiple crimes do not involve the same criminal course of conduct is reviewed upon an

abuse of discretion standard. The crime of felony harassment requires a threat to kill, an element entirely absent from the crime of assault in the second degree with a weapon. The defendant committed assault with a gun, but also threatened to kill the victim. Did the trial court properly exercise its discretion by finding that the intent required for each crime was different and one crime was not necessary to further the other?

4. By statute, firearm enhancements for each count must be served consecutively, regardless of whether or not the underlying crimes involve the same criminal conduct. Did the trial court properly impose consecutive firearm enhancements?

5. Does the imposition of consecutive firearm enhancements violate double jeopardy?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Bayani John Mandanas was charged in Count I with Assault in the Second Degree and in Count II with Felony Harassment, with special firearm allegations for each count. CP 16-17. Mandanas was tried by jury before King County Superior Court Judge Gregory Canova. The jury found Mandanas guilty of both counts as charged,

and returned special verdicts that he was armed with a firearm. CP 120-23. With consecutive firearm enhancements, Mandanas received a sentence of 57 months. CP 169-76. Mandanas timely appealed. CP 152-60.

## 2. SUBSTANTIVE FACTS

On December 20, 2004, John Mandanas assaulted Carlos Padilla with a firearm, and threatened to kill him when both men were at the Southgate Medical Clinic in South Seattle. Padilla had been involved in a relationship with Mandanas' wife Eleanor. 3RP 94.<sup>1</sup> In July or August, 2004, after Padilla had begun seeing Eleanor, Mandanas told Padilla to stop seeing her because they were still married and their divorce was not final. 3RP 95. Padilla told Mandanas that he would stop seeing Eleanor. 3RP 95. However, Padilla and Eleanor continued to see each other until December 8, 2004, when they mutually terminated the relationship. 3RP 96.

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<sup>1</sup> There are six volumes of the verbatim report of proceedings, as follows: Volume 1 - November 16, 2005; Volume 2 - November 17, 2005; Volume 3 - November 21, 2005; Volume 4 - November 22, 2005; Volume 5 - November 23, 2005; Volume 6 - February 10, 2006.



On December 20, 2004, Carlos Padilla went to the Southgate Medical Clinic to pick up results of a TB test that he needed for his employment. 3RP 97-98. He got to the clinic at about 2:00 p.m., spoke to the nurse in the small foyer of the clinic, got his TB results, and stepped outside. 3RP 99.

Padilla only got a couple of steps outside the clinic when he was confronted by Bayani Mandanas. Mandanas immediately threw a punch, hitting Padilla in the mouth, and told him he would kill him. 3RP 99-100. Padilla tried to defend himself by punching back, and by blocking another of Mandanas' punches. 3RP 100. On one of Mandanas' blows to Padilla's head he felt a metal object, and then saw that Mandanas was pointing a gun at him. 3RP 101. While Mandanas was pointing his gun two or three feet from his head, Padilla felt blood coming from his head. 3RP 102. Mandanas continued to say he was going to kill Padilla. 3RP 102.

With the gun pointed at his head, Padilla told Mandanas that he had a family and children, and begged for his life. 3RP 103. He tried to explain to Mandanas that he had already broken up with Eleanor. 3RP 103. Mandanas replied that Padilla "was going down," and continued pointing the gun at him. 3RP 104. Padilla backed up toward the clinic, still begging for his life. 3RP 105.

Padilla backed inside the clinic and sat down in a chair, but Mandanas followed and hit him again with the gun, above his ear. 3RP 116. Padilla continued to beg for his life, telling Mandanas not to kill him, and that he was done with Eleanor. 3RP 117. He again told Mandanas that he had children. 3RP 117. Padilla then asked people in the clinic to call 911, which they did. 3RP 119. When Mandanas heard that the police were being called, he left. 3RP 33, 86.

Osman Suleiman was in the front office of the clinic when the assault occurred. 2RP 40. His attention was drawn to the commotion outside when it appeared that two people were fighting. 2RP 42-43. Initially, he could not tell if they were fighting for real or play-fighting. 2RP 43. However, when he saw Mandanas pull a small black gun from his pants and point it at Padilla, he knew that the confrontation was for real. 2RP 44-45. He saw Mandanas strike Padilla in the head with the gun. 2RP 45. Padilla screamed when he was struck. 2RP 46. Suleiman watched Padilla, who was hurt, come into the clinic and sit down in a seat. 2RP 47. Mandanas followed, speaking with Padilla in a language Suleiman could not understand (Tagalog). 2RP 47-48. Mandanas kicked Padilla's seat while still

pointing the gun at him. 2RP 48. Padilla, who was crying, screamed and took no defensive action toward Mandanas. 2RP 50. Mandanas then left. Suleiman believed that the entire incident happened in about a minute. 2RP 51, 59.

Mary Lou Bondoc and her mother-in-law, Estrella Bondoc, were at the clinic that day for an appointment. 3RP 5. Estrella went next door to a gift shop. 3RP 24. Estrella speaks Tagalog and heard Padilla say to Mandanas, "What did I do to you?" 3RP 25. She went outside the gift shop and saw Mandanas hit Padilla three or four times in the face, with Padilla trying to cover up. 3RP 25-28, 50. Padilla fell down by the door of the clinic. 3RP 28, 47-48. She also saw Mandanas pull a gun from his waistband. 3RP 29. He pointed it at Padilla, who was scared and started to cry. 3RP 31. Padilla again began saying, "What did I do to you?" 3RP 31.

Estrella then saw Padilla go into the clinic, followed by Mandanas. 3RP 31. From outside, she could see that Mandanas continued to hit Padilla in the head when they were inside the clinic. 3RP 32-33. Padilla never tried to get away from Mandanas, or to get the gun. 3RP 35. He simply told Mandanas, "Stop, stop." 3RP 35.

Estrella went inside the clinic after Mandanas left, and learned that the police had been called. 3RP 33.

Mary Lou Bondoc remained inside the clinic when Estrella went next store to the gift shop. 3RP 5. She looked outside and saw two people punching each other. 3RP 5. Then Padilla came into the clinic, bleeding. 3RP 7. He said, "Hide me, hide me." 3RP 13. Mandanas followed Padilla in and pointed a gun at him. 3RP 8. Mandanas asked Padilla, "What are you going to do?" 3RP 8. He also told him, "I will kill you." 3RP 9. He was pointing the gun close to Padilla's head at the time he threatened to kill him. 3RP 9. Padilla was sitting down, bleeding. 3RP 9-10. Padilla told Mandanas that he did not do anything and that his relationship with Eleanor was over. 3RP 14. Mandanas then struck Padilla when he was sitting in the chair. 3RP 11. Mandanas left when the police were called. 3RP 12.

Seattle Police Officer George Lee responded to the call from the clinic. 3RP 66. When he arrived he saw blood on the sidewalk, a trail of blood leading into the clinic, and a larger pool of blood in the foyer on the floor and on the walls. 3RP 66. By following the trail of

blood, he found Padilla, who was still bleeding. 3RP 67. Medical personnel by then were treating Padilla. 3RP 68.

Later, Padilla told police that Mandanas had approached him as he was going to the clinic, pulled a gun and told him to leave his wife alone. 3RP 86. Mandanas then hit him on the side of the head with the gun. 3RP 86. Padilla told the police there was a brief struggle as he tried to get away and that he went into the medical clinic. 3RP 86. Mandanas followed Padilla, pointed the gun at him, and told him that if he did not leave Mandanas' wife alone he was going to kill him. 3RP 86. While they were inside, Mandanas hit him again with the gun, then left. 3RP 86.

The following day, Mandanas, accompanied by his lawyer, turned himself in to police. 3RP 70. He turned over a .38 caliber Smith & Wesson revolver, with five bullets. 3RP 70-71; 4RP 30. The gun was later determined to be functional and in working condition. 3RP 137-38.

At trial, Mandanas testified that on December 20<sup>th</sup> he was returning from a bank after making a deposit and decided to smoke a cigarette near the clinic. 3RP 187-89. He had his gun under his belt

on the right side of his back. 3RP 191. Mandanas said that as he was talking on the telephone Padilla came up and punched him, knocking the gun out of his belt. 3RP 194. He denied ever pointing his gun at Padilla, saying he tried to retrieve the gun after it fell because he did not want Padilla to get it. 3RP 195; 4RP 15. He said Padilla started going to the office of the clinic and he thought that Padilla was going to get a weapon. 3RP 197. Mandanas followed Padilla inside and pushed him down because he did not want him to get out. 4RP 9. Mandanas said there was a struggle and that he then left the clinic, with his gun in his pocket. 4RP 10. He denied ever pointing his gun at Padilla, and denied that he ever threatened to kill him. 4RP 15. He said he just held his gun and then put it in his pocket. 4RP 15.

C. ARGUMENT

1. NO PETRICH INSTRUCTION WAS REQUIRED  
BECAUSE THE CHARGED CRIMES OCCURRED  
DURING A CONTINUOUS COURSE OF CONDUCT.

Mandanas asserts that his right to a unanimous jury was violated by the failure of the court to instruct the jury that they had to

be unanimous regarding which specific act constituted second degree assault and which constituted felony harassment. He claims that because he pointed the weapon and struck Padilla with it both inside and outside the medical clinic, and threatened to kill him both inside and outside, the jury should have been instructed that they had to agree unanimously which act constituted the charged crimes. However, because the assaults and threats to kill occurred during a very brief, continuous course of conduct, no Petrich<sup>2</sup> instruction was required.

When the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident. State v. Petrich, 101 Wn.2d at 569; State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). However, where the State presents evidence of multiple acts which indicate a "continuing course of conduct," neither an election nor a unanimity instruction is required. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). A continuing course of conduct requires an ongoing

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<sup>2</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

enterprise with a single objective. State v. Gooden, 51 Wn. App. 615, 619-20, 754 P.2d 1000 (1988). Common sense must be utilized to determine whether multiple acts constitute a continuing course of conduct. Handran, 113 Wn.2d at 17.

Here, there was undisputed evidence that Mandanas' assaults and threats to kill occurred in a very short time period at the medical clinic. Padilla and other eyewitnesses testified that Mandanas started a fight, pointed his pistol at Padilla, hit him in the head with the gun, and threatened to kill him outside the clinic. When Padilla tried to get away by backing into the clinic, Mandanas followed, pointing his gun, striking him, and threatening to kill him while he was inside the clinic. The entire incident was continuous, lasting only a minute or two. 2RP 51, 59; 3RP 126; 4RP 6. Under a common sense evaluation of the facts, the actions of Mandanas evidenced a continuing course of conduct to assault Padilla with a weapon, as well as a continuing course of conduct to threaten to kill him.

The continuing course of conduct exception has been applied to multiple acts of assault over a two-hour time period, resulting in a fatal injury, State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991);



to two acts of assault occurring in one place, during a short period of time, by the same aggressor upon a single victim, in an attempt to secure sexual relations, State v. Handran, 113 Wn.2d at 17; to two acts taken collectively which promote prostitution, State v. Gooden, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988); and to possession of cocaine with intent to sell, for drugs found on the defendant's person during his arrest on the street, and for drugs found later during a search warrant at his residence, State v. Love, 80 Wn. App. 357, 360-63, 908 P.2d 395 (1996). Mandanas' actions in assaulting and threatening to kill Padilla in one continuous course of conduct occurring at one location over a very brief time period easily fall within the continuing course of conduct exception to Petrich.

Mandanas also argues that two alternative means of second degree assault were argued and that the evidence only supported one means. He claims that he could have been convicted for either pointing his gun at Padilla or hitting him in the head with his gun. He asserts that assault with a deadly weapon can only be committed by pointing the weapon, and not by using the weapon to strike Padilla.

Br. App. 22-27. While Mandanas cites a number of alternate means cases, he offers no authority to support his contention that when one takes a fully-loaded handgun and beats a person about the head with it, an assault with a deadly weapon does not result.

The trial court gave the standard WPIC instruction defining the term "deadly weapon," which includes any firearm, whether loaded or not. Court's Instr. No. 9; CP 107. When Mandanas hit Padilla over the head with a fully-loaded handgun, he was assaulting him with a deadly weapon. Mandanas' claim that the legislature never intended such an act to constitute assault in the second degree is unsupported by logic or authority, and should be rejected.

2. MANDANAS HAS WAIVED ANY CHALLENGE TO THE COURT'S SELF-DEFENSE INSTRUCTIONS BY FAILING TO OBJECT AT TRIAL; THERE WAS NO MANIFEST CONSTITUTIONAL ERROR.

Mandanas claims that the trial court erred in giving WPIC 17.02, the standard self-defense instruction, as well as WPIC 16.05, the definition of "necessary," and also erred by failing to give WPIC 16.07, the "mistaken belief" instruction, and WPIC 16.08, the "no duty

to retreat" instruction. However, Mandanas did not propose any self-defense instructions, nor did he challenge any of the court's instructions relating to self-defense. By failing to object, under RAP 2.5(a), Mandanas has waived any challenge to the court's instructions that were given or the court's failure to give other self-defense instructions, because the alleged errors had no identifiable or practical effect on the trial.

It is undisputed that Mandanas proposed no self-defense instructions, nor did he take any exceptions to the court's instructions relating to self-defense. 3RP 112; 4RP 71-78. Because Mandanas did not challenge the instructions below, he may only be granted relief if this issue involves a "manifest error affecting a constitutional right." RAP 2.5(a). But, "the exception actually is a narrow one, affording review only of certain constitutional questions." State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). This narrow exception is frequently misread; it may not be invoked merely because the defendant can identify a constitutional issue not litigated below. State v. Valladares, 31 Wn. App. 63, 75-76, 639 P.2d 813 (1982). Allowing "every possible constitutional error" to be raised for the first time on appeal

undermines the trial process and would waste resources. State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251 (1992). See also State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The asserted error must be "truly of constitutional magnitude," which means that Mandanas must show that he was actually prejudiced by the error. State v. Scott, 110 Wn.2d at 688.

The proper approach to analyzing alleged constitutional error raised for the first time on appeal is set forth in State v. Lynn:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Lynn, 67 Wn. App. at 345.

Thus, an alleged error is "manifest" only if the defendant can show it had practical and identifiable consequences in the trial of the

case. "In normal usage, 'manifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.

'Affecting' means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient." Lynn, 67 Wn. App. at 345. In other words, the defendant must show how the alleged error actually affected his constitutional rights. Lynn, at 346. In Lynn, the impact of an alleged confrontation clause error was purely speculative, so the court declined to review it on appeal. Lynn, at 346-47.

Mandanas initially asserts that the court erred in giving the standard WPIC 17.02 instruction defining the parameters of self-defense in an assault case, as set forth in Court's Instr. No. 11. In the second portion of the general self-defense instruction, the court instructed the jury:

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than necessary.

CP 109.

Mandanas relies on State v. Bland, 128 Wn. App. 511, 116 P.3d 428 (2005), to support his contention that the word "or" should have been inserted after the word "injured" and before the words "in preventing." However, Mandanas has failed to demonstrate that insertion of the conjunction "or" would have changed the meaning of the self-defense standard in his case. Nor has he explained how, if the court erred, it had any effect on the outcome of his trial.

The jury resolved Mandanas' claim of self-defense was resolved by the jury by making a credibility determination regarding his testimony and that of Padilla, who was corroborated extensively by three independent witnesses. Mandanas' self-defense claim was not rejected because a conjunction was missing from the court's general self-defense instruction. In Bland, the lack of the conjunction had a direct bearing in the case because his self-defense claim was based on the allegation that the victim was committing a trespass against Bland's property. Under those circumstances, the trial court reviewed the error and found that the constitutional error was not harmless, and a new trial was ordered. It is inconceivable that the outcome of the trial in Mandanas' case was affected by the error in

the instruction. Thus, this Court should refuse to consider his claim on appeal because he failed to object below.

Similarly, Mandanas claims that giving the definition of "necessary," taken directly from RCW 9A.16.010(1) and 9A.16.020(3), was error. Mandanas acknowledges that the Washington Pattern Instruction Committee recommends that "necessary" and its definition should be given in non-homicide self-defense cases. Mandanas simply argues that because the WPIC committee does not authorize the use of "necessary" in a murder case, that it should not be used in an assault case. However, it is readily apparent that the legislature required that in a non-homicide self-defense case that the force employed be reasonable and necessary. Mandanas makes no argument that such a legislative determination is unconstitutional. Instead, he makes a strained argument that necessary force only applies when self-defense is used in trespass and defense of property cases. However, a plain reading of RCW 9A.16.020(3) shows that the requirement that force be not more than necessary applies and modifies every individual section of the statute.

In any event, Mandanas has not shown that using the term "necessary" had any identifiable or practical effect on the outcome of the case. If the jury believed that Mandanas was attacked by Padilla, his use of force could have been upheld under the instructions given by the court. The prosecution never argued that Mandanas used excessive force to defend himself. Rather, the State's entire case rested on the fact that Mandanas was the aggressor, struck the victim first, pulled his gun, and threatened to kill an unarmed individual. Mandanas has not satisfied the criteria and case law relating to RAP 2.5(a)(3) and, by failing to object, he has waived any challenge on appeal.

Mandanas further argues that the trial court should have given the "mistaken belief" instruction of WPIC 16.07. Of course, this instruction was never requested by defense counsel. Thus, Mandanas has waived any claim on appeal unless he has shown that manifest constitutional error has occurred. Here, there was no error at all. This is a discretionary instruction that must be requested by a party, and Mandanas has cited no authority requiring a trial court to sua sponte give this instruction absent a request. Furthermore, there



was no manifest constitutional error. The jury either believed that Mandanas was the aggressor or that he was the victim. If Padilla indeed attacked him there would be no necessity for a "mistaken belief" instruction. Mandanas did not claim he reasonably but mistakenly came to the defense of some other person. The general self-defense instructions provided Mandanas ample opportunity to argue his theory of the case.

Finally, Mandanas argues that the trial court should have given WPIC 16.08, the "no duty to retreat" instruction relating to self-defense. However, no such instruction was requested, nor has there been any showing on appeal that this was manifest constitutional error. This is another discretionary instruction that must be requested by a party. This case came down to who was the aggressor and who was credible. At no time did the prosecution argue that Mandanas had a duty to run away or take any other evasive action. This instruction had nothing to do with the outcome of the case.

All of Mandanas' claims regarding the self-defense instructions had been waived by failing to object at trial, and should not be

reviewed for the first time on appeal. There was no manifest constitutional error that had an identifiable and practical effect on the trial. This Court should decline review of these claims pursuant to RAP 2.5(a)(3).

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY FINDING THAT THE CRIMES DID NOT INVOLVE THE SAME COURSE OF CONDUCT.

Mandanas claims that the assault in the second degree and felony harassment charges were all part of the same criminal conduct and should not have been scored separately for sentencing purposes. While the crimes involved the same victim and took place during the same time period, they involved different criminal intent. When viewed objectively, the intent required for assault was different from that required for felony harassment, which involves a threat to kill. The trial court did not abuse its discretion in finding that the two offenses did not encompass the same criminal conduct.

A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the

law. State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). RCW 9.94A.589(1)(a), provides that when a defendant is convicted of two or more crimes, current offenses are treated as prior offenses for determining the offender score unless the current offenses encompass the same criminal conduct, in which case the current offenses are counted as one crime. For multiple crimes to be treated as the "same criminal conduct," the crimes must have (1) been committed at the same time and place; (2) involve the same victim; and (3) involve the same objective criminal intent. RCW 9.94A.589(1)(a); Tili, 139 Wn.2d at 123; Walden, 69 Wn. App. at 187-88. The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next. Tili, at 123.

Judge Canova concluded, after reviewing trial evidence and appropriate case law, that Mandanas' convictions for assault in the second degree and felony harassment did not clearly constitute the same criminal conduct. 6RP 4-5. The court found that assault in the second degree required a different level of intent from felony

harassment. 6RP 5. Mandanas' intent was different for the two crimes. He intentionally assaulted Padilla with a firearm, both by pointing it at him and hitting him with the gun. The crime of assault with a deadly weapon, however, does not include a requirement that Mandanas threaten to cause bodily injury and threaten to kill Padilla. The threat to injure and kill, which Mandanas repeated both inside and outside the clinic, was completely unnecessary for the commission or furtherance of assault in the second degree. The trial court's conclusion that the crimes did not involve the same criminal conduct was supported by the evidence. The two crimes did not further a single criminal purpose. Rather, Mandanas committed two crimes, each with different elements.

State v. Tili and State v. Walden support the trial court's conclusion in this case. In Tili and Walden, multiple sex acts occurred against the same victim and those acts were found to further the single criminal purpose, namely to commit the sexual crimes. In Mandanas' case, the threats to kill interjected a whole new level of criminal culpability above and beyond the act of intentional

assault with a weapon. It cannot be said that no reasonable trial judge would have found that there were different objective intents involved in the two crimes. Judge Canova did not abuse his discretion in scoring each of the crimes separately.

4. THE FIREARM ENHANCEMENTS MUST RUN CONSECUTIVELY.

Mandanas claims that the firearm enhancements must run concurrently because his crimes should be scored as same criminal conduct. As discussed, his crimes were not the same criminal conduct. However, even if the assault and harassment charges were the same criminal conduct, by law the firearm enhancements must run consecutively.

RCW 9.94A.533(3)(e) expressly provides that all firearm enhancements shall be served in total confinement and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses for which a defendant is sentenced. Despite the plain language of this statute, Mandanas asserts that if his crimes involved the same criminal

conduct under RCW 9.94A.589(1)(a), the sentencing enhancements must also run concurrently. He cites no authority for this proposition, and it should be rejected.

The legislative intent to run firearm enhancements consecutively could not be more clear. The statute was amended following In re Post Sentencing Review of Charles, 135 Wn.2d 239, 955 P.2d 798 (1998), after the Washington Supreme Court ruled that under the previous firearm enhancement statutes, the trial court had discretion to run the enhancements concurrently. This is no longer the case.

Regardless of whether the underlying crimes were or were not the same criminal conduct, the firearm enhancements must now run consecutively. Mandanas' precise argument was rejected in State v. Callihan, 120 Wn. App. 620, 85 P.3d 979 (2004). In Callihan, a defendant was convicted of two counts of assault in the second degree against the same victim for separate assaults, one inside a residence and one outside a residence. The trial judge found that the assaults constituted the same criminal conduct, but ordered the firearm enhancements to be served consecutively. In Callihan,

Division III upheld the sentence of the trial court, holding that the sentencing provision with regard to firearm enhancements was plain on its face, and required consecutive sentences. In Callihan, a finding that two offenses were part of the same criminal conduct resulted in a lower standard range, but the firearm enhancements for each count still had to be served consecutively. Accord: State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003). Mandanas' claim should be rejected. There is no longer any ambiguity regarding the fact that sentencing enhancements must be served consecutively for each count.

5. IMPOSITION OF CONSECUTIVE FIREARM  
ENHANCEMENTS DID NOT VIOLATE DOUBLE  
JEOPARDY.

Mandanas makes a cursory and confusing argument that imposition of consecutive firearm enhancements for each crime violates double jeopardy. Br. App. 49-50. The imposition of two enhancements for the use of a single weapon to commit multiple crimes against a single victim does not violate double jeopardy. It is well settled that sentence enhancements on offenses committed with

weapons do not violate double jeopardy even where the use of the weapon is an element of the crime. State v. Nguyen, \_\_\_ Wn. App. \_\_\_ (Slip Op. No. 55443-3-I, Division I, filed September 11, 2006). If Mandanas is arguing that because a firearm was used in the underlying crime of assault with a deadly weapon then the imposition of an enhancement violates double jeopardy, that claim has consistently been rejected. See Nguyen. If Mandanas is arguing that double jeopardy prohibits conviction for both second degree assault and felony harassment, his arguments also fail. There are different elements required for each offense. As charged in Mandanas' case, assault in the second degree required an assault with a deadly weapon. Felony harassment required a threat to kill which the victim reasonably believed would be carried out. These are separate crimes for which multiple punishments can be imposed. It is apparent that the legislature intended to punish criminal conduct under each statute. Whatever Mandanas is arguing with regard to double jeopardy, his claims are without merit.



D. CONCLUSION

Mandanas' convictions and sentences for assault in the second degree and felony harassment should be affirmed.

DATED this 25 day of October, 2006.

Respectfully submitted,

NORM MALENG  
King County Prosecuting Attorney

By: Lee D. Yates  
LEE D. YATES, WSBA #3823  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

**Certification of Service by Mail**

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Todd Maybrown, the attorney of record for the appellant, at the following address: Allen, Hansen & Maybrown, P.S., 600 University Street, Suite 3020, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BAYANI JOHN MANDANAS, Cause No. 57738-7-I, in the Court of Appeals, Division I, of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

uBrame  
Done in Seattle, Washington

10/26/06  
Date

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